Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

81-1457

No. –

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITIZENS AGAINST UFO SECRECY,

Petitioner,

vs.

NATIONAL SECURITY AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH SEIJAS
ROTHBLATT, ROTHBLATT & SEIJAS
191 East 161st Street
Bronx, NY 10452
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January 1982

(11973)

QUESTIONS PRESENTED

I. Whether the District Court acted improperly by granting NSA a total exemption from the disclosure requirements of the Freedom of Information Act.

II. Whether the District Court acted improperly in finding that NSA presented sufficient evidence to substantiate its claim that no information concerning or contained in the withheld documents could be released without harm to national security.

III. Whether the District Court acted improperly in refusing to conduct an In Camera review of the withheld documents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	1
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	5
JURISDICTION.....	5
OPINIONS IN THE COURTS BELOW.....	5
STATEMENT OF THE CASE.....	6
I. WHETHER THE DISTRICT COURT ACTED IMPROPERLY BY GRANTING NSA A TOTAL EXEMPTION FROM THE DISCLOSURE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT.....	10
II. WHETHER THE DISTRICT COURT ACTED IMPROPERLY IN FINDING THAT NSA PRESENTED SUFFICIENT EVIDENCE TO SUBSTANTIATE ITS CLAIM THAT NO INFORMATION CONCERNING OR CONTAINED IN THE WITHHELD DOCUMENTS COULD BE RELEASED WITHOUT HARM TO NATIONAL SECURITY.....	14
III. WHETHER THE DISTRICT COURT ACTED IMPROPERLY IN REFUSING TO CONDUCT AN IN CAMERA REVIEW OF THE WITHHELD DOCUMENTS.....	17
APPENDICES.(details on p. 21).....	21

TABLE OF AUTHORITIES

Cases	Page
Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).....	
Founding Church of Scientology v. NSA, 610 F.2d 339 (1978)*.....	
Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir., 1978). Rehearing denied 1979*....	
Hayden and Fonda v. National Security Agency, 197 U.S. App. D.C. 608 F.2d 1381 (1979), cert. denied 48 U.S.L.W. 3730 (May 13, 1980).....	10,13
Kruh v. General Services Administration, 421 F. Supp. 965 (E.D. N.Y., 1967).....	10
Ray v. Turner, 190 U.S. App. D.C. 290, 587 F.2d 1187 (1978)*.....	
Serbian Eastern Orthodox Diocese, etc. v. National Security Agency Civil Action No. 78-03 (D.D.C., July 13, 1978) Mem. Order.....	10
Weberman v. National Security Agency, 409 F.Supp. 9 (S.D.N.Y. 1980), 507 F.Supp. 117 (S.D.N.Y. 1981)*.....	11,12

TABLE OF AUTHORITIES (cont'd)

Statutes

5 U.S.C. Section 552(b)(3)*.....

Public Law No. 86-36 Section 6; 73 Stat. 63 (1959)*.....

Miscellaneous

Executive Order 12065 Fed. Reg. 28949 (1978)*.....

*Cases and authorities chiefly relied upon are marked with an asterisk.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the Freedom of Information Act 5 U.S.C Section 552(b)(3), reprinted at Appendix pages 42-52 , Public Law No. 86-36, Section 6, reprinted at Appendix, page 53 , and Executive Order 12065 Fed. Reg. 28949 (1978), reprinted at Appendix, page 53.

JURISDICTION

Jurisdiction of this Court is based upon 28 U.S.C Section 1254(1).

OPINIONS IN COURTS BELOW

The opinions in the courts below may be found reprinted in the Appendix at pages 22-27.

STATEMENT OF THE CASE

In a letter dated December 22, 1978 the petitioner Citizens Against UFO Secrecy (hereinafter known as CAUS) filed a Freedom of Information Act (FOIA) 5 USC Section 552 request with the National Security Agency (NSA). CAUS sought the release of eighteen documents relating to unidentified flying objects (UFOs) that had been located in the course of an unrelated FOIA lawsuit.[1] These documents were referred back to the originating agency, NSA, for evaluation and possible release.

By letter dated January 9, 1979 NSA informed CAUS that it had received the documents but considered them to be exempt in their entirety pursuant to 5 U.S.C. Section 552(b)(1) and (b)(3). By letter

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1. Ground Saucer Watch, Inc. v. Central Intelligence Agency, 10 C.D.C. No. 78-859.

dated January 29th the petitioner appealed the decision under 5 U.S.C. 552(a)(b)(A). By letter dated March 2, 1979 NSA notified CAUS that the Agency FOIA Appeals Authority had sustained the Agency's withholding of the requested documents.

On February 16, 1979 CAUS filed a general request, with NSA, for "all documents in the possession or under the control of the National Security Agency relating to or pertaining to Unidentified Flying Objects (UFOs) and the UFO phenomena." NSA's response acknowledged withholding one hundred thirty-five UFO related documents. NSA based their decision on exemptions (b)(1) and (b)(3). CAUS appealed but the appeal was denied on March 24, 1980.

On June 24, 1980 CAUS filed a complaint in the District Court of the

District of Columbia seeking production of the requested documents.[2] On October 1, 1980 NSA filed a motion for summary judgement and submitted one public affidavit and one In Camera affidavit in support of its motion. In its opposing motion filed November 18, CAUS argued that NSA's affidavits had not justified the withholding of all information concerning or contained in the documents. CAUS argued that "non-sensitive" UFO content could be reasonably segregated and released without damage to national security or NSA. CAUS urged the court to balance the possible risk to national security against the great public interest and, most importantly, the potential

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2. The parties to the suit were and are the petitioner CAUS and the National Security Agency. Jurisdiction was conferred on the basis of the provisions of the Freedom of Information Act 5 U.S.C. Section 552.

scientific benefits to be gained from release. CAUS requested that the court examine the documents before reaching any conclusion on the balancing issue.

On November 18, 1980 the District Court granted NSA's motion for Summary Judgement finding:

> "...that release of this material could seriously jeopordize the work of the agency and the security of the United States....The in camera affidavit presents factual considerations which aided the court in determining that the public interest in disclosure is far outweighed by the sensitive nature of the materials and the obvious effect on national security their release may well entail." [See Appendix at page]

The case was appealed on January 12, 1981. On November 3, 1981 the court issued a Per Curiam Judgement affirming the judgement of the District Court "generally for the reasons stated in its Memorandum and Order."

I

WHETHER THE DISTRICT COURT ACTED IMPROPERLY BY GRANTING NSA A TOTAL EXEMPTION FROM THE DISCLOSURE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT

The District Court accepted without question NSA's overbroad claim of exemption from the provisions of the FOIA. Such immunity violates the legislative intent of the Congress and virtually emasculates the discretionary power vested in the District Court.

In this case NSA inflates its already wide umbrella against disclosure[3] to the point where it has become exempt from the provisions of the FOIA.

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3. See Kruh v. General Services Administration, 421 F. Supp. 965 (E.D.N.Y., 1967), Hayden and Fonda v. National Security Agency, 197 U.S. App. D.C., 608 F.2d 1381 (1979), cert. denied, 48 U.S.L.W. 3730 (May 13, 1980), and Serbian Eastern Orthodox Diocese, etc. v. National Security Agency, Civil Action No. 78-03 (D.D.C., July 13, 1978) Mem. Order.

Though NSA admits that the UFO related content of the withheld documents is "non-sensitive," it uncompromisingly refuses to release any of this information. According to NSA:

> "...publication of the contents of the documents at issue would disclose information since only information about an intercepted communication concerns an NSA activity, and is thus exempt from disclosure under Public Law 86-36(b)(3)." NSA Brief In Support Of The Motion For Summary Judgement (emphasis added).

The provisions of Public Law 86-36 provides that:

> "Nothing in this Act or any law shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof...." Public Law 86-36 Section 6.

NSA's expansive claims were accepted by both the District Court and by the District of Columbia Court of Appeals. Yet in other circuits the question is seen in a different way. In Weberman v. National Security Agency, 490 F.Supp.

9 (S.D.N.Y. 1980), 507 F. Supp. 117 (S.D. N.Y. 1981) the District Court held that the NSA's refusal to disclose the existence or non-existence of a telegram was unjustified under exemption 3 of the FOIA.

As the Court states in Weberman:

> "Of course, all information gathered by the NSA relates in some way to an NSA activity, simply because the gathering itself is an activity of the Agency. However the underlying policy of the FOIA, which favors full disclosure, requires a more realistic construction of Section 6.... [Disclosure] in the factual context of this particular case will neither disclose 'intelligence sources or methods'...nor will NSA be furnishing 'classified information...concerning the communication intelligence activities'." Weberman at 15.

Compare that analysis with the holding of the District Court in this case:

> "The communications intelligence reports relate to the most sensitive activities of the defendant and thus fall squarely within the protection of Public Law 86-36." District Court Mem. and Order.

The court has taken a relationship that exists only in terms of cause and effect and mistakenly concluded that this inevitable activity/product relationship triggers the protection of Public Law 86-36.

Unfortunately, Hayden has spawned doubtful progeny. An understandable desire to isolate NSA to prevent the disclosure of security sensitive information has led the courts to gradually accede to the suppression of non-sensitive information of great public interest and scientific value.

II

WHETHER THE DISTRICT COURT ACTED IMPROPERLY IN FINDING THAT NSA PRESENTED SUFFICIENT EVIDENCE TO SUBSTANTIATE ITS CLAIM THAT NO INFORMATION CONCERNING OR CONTAINED IN THE WITHHELD DOCUMENTS COULD BE RELEASED WITHOUT HARM TO NATIONAL SECURITY

NSA's affidavits failed to justify the suppression of all information, especially "non-sensitive" UFO related content. In fact when certain information was inadvertently released by the CIA no injury to national security occurred. The CIA had given CAUS the dates of eighteen UFO documents. In the absence of any specific evidence injury the District Court should have concluded that release of similar information contained within the other one hundred seventeen documents was warranted.

The NSA should have been compelled to prove that release of identifiable material would provide an adequate data

base from which a foreign power could discern patterns of interception. See Weberman at 14.

The District Court accepted on faith NSA's representations that patterns of interception could be discerned from the release of even innocuous segregated data. Yet for this to be so it would seem that the material must only be obtainable from a unique source. Otherwise any foreign power would be faced with alternative sources each leading to different assumptions concerning NSA interception activities. Such a multiplicity of alternatives seems likely with regard to UFO incidents since numerous sources might have transmitted the information.

A hypothetical example will demonstrate the flaw in the NSA's claim that no intercepted information can ever be released without risk. Let us postulate

that the NSA has intercepted a communique transmitted by an embassy located in the United States. The message is intercepted on November 4, 1980 and after reporting the result of the election goes on to evaluate its implications. Surely the release of certain factual content (i.e. the election of Mr. Reagan) could not compromise security or even reveal the channel that had been monitored.

This example serves to highlight a major argument of the petitioner that was ignored by the lower courts. Content can be segregated from document context and be released without risk especially where the source is not unique or is already partially public.[4]

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4. For example the 1967 Cuban Mig/UFO encounter, the 1976 Iranian Air Force/UFO encounter, or the 1980 Peruvian Air Force/UFO encounter.

III

WHETHER THE DISTRICT COURT ACTED IMPROPERLY IN REFUSING TO CONDUCT AN IN CAMERA REVIEW OF THE WITHHELD DOCUMENTS

Executive Order 12065 was intended "to balance the public's interest in access to government information with the need to protect certain national security information from disclosure." 43 Fed. Reg. at 28949. Section 30303 expressly states that:

> "In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified." (Emphasis added. 43 Fed. Reg. at 28955.)

Public interest in UFOs was recognized by the court. This phenomena has been observed for the past thirty-five years by reliable and responsible individuals including scientists and military personnel. Even certain NSA staff members concur with the assessment that

UFO data may be of great scientific significance, (Exhibit H and I of the Petitioner's Complaint). In light of the government's decision that UFOs do not warrant further scientific study, added weight should be accorded the public interest in this case. Marks v. Turner, Civil No. 77-1108 (D.D.C. May 7, 1980). It would be unfortunate if irreplacable data in the possession of the government was lost to private researchers.*

The NSA should have evaluated the possibility of releasing the requested data in the light of its scientific value. The public affidavit of Eugene Yates, Chief of the NSA Office of Policy states that he reviewed the withheld documents in accordance with the provisions of Executive Order 12065. Yet what he

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*43 Fed. Reg. at 28953 Section 1-602 states that basic scientific research information not clearly related to national security may not be classified.

actually did was to:

> "...have weighed the significant need for openness in government [emphasis added] against the likelihood of damage to our national security at this time and determined that the records should continue to be classified...."(Yeate's Affidavit)

Given the failure of NSA to properly balance the issues, as mandated in Executive Order 12065 and even more importantly its failure to even attempt to segregate non-sensitive scientifically significant UFO related content, it was necessary for the District Court to undertake its own effort to harmonize the competing interests. Unfortunately, the court erred in its refusal to examine the documents In Camera.

When a balancing test is made the needs of national security are weighed against two factors. The first is the interest of the public to be informed regarding the issue. Such an interest was found to exist by the court. The

second factor is the value of the content sought and its potential contribution to the issue in controversy. By placing itself in a position of absolute dependence on NSA's affidavits, one of which was not subject to adversary challenge, the District Court was unable to reach an informed decision as to whether the public's right to secure information under the FOIA was indeed overborne by sufficiently powerful and unavoidable security considerations.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the District of Columbia Circuit's judgement of November 3, 1981.

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APPENDICES

APPENDICES

	Page
District Court Memorandum and Order.....	22
Court of Appeals Judgement.....	27
January 10, 1980 NSA Letter.....	29
March 2, 1979 NSA Letter.....	33
March 24, 1980 NSA Letter.....	37
Freedom of Information Act.....	42
Public Law 86-36 Section 6.....	53
Executive Order 12065 Fed. Reg. 28949 (1978).....	53
Yeate's Public Affidavit.....	56

MEMORANDUM OPINION AND ORDER
GRANTING MOTION FOR
SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CITIZENS AGAINST UFO SECRECY, Plaintiff, v. NATIONAL SECURITY AGENCY, Defendant.	)	Civil Action No. 80-1562

MEMORANDUM AND ORDER

This Freedom of Information Act case is before the Court on defendant's motion for summary judgment. Plaintiff is seeking all documents in defendant's possession relating to UFOs and UFO phenomena. Defendant has provided some material but has withheld other material pursuant to various FOIA exemptions, see 5 U.S.C. §552(b)(1976). The bulk of the material withheld consists of

communications intelligence reports, which defendant asserts are protected by Exemptions 1 and 3 of the Freedom of Information Act. Four documents at issue are not communications intelligence reports; defendant has withheld one of these documents in its entirety, and portions of three others, pursuant to these exemptions, and exemptions 5 and 6.

The Court first carefully reviewed the public affidavit of National Security Agency official Eugene Yeates and then, after receiving plaintiff's opposition, examined personally a top secret affidavit from Yeates, submitted by defendant in camera. The public affidavit provides a general statement of the defendant's position that is strongly bolstered by the extremely detailed, 21-page in camera filing. On the basis of these affidavits, the Court finds that the claimed exemptions have been properly and

conscientiously applied.

The communications intelligence reports clearly relate to the most sensitive activities of the defendant and thus fall squarely within the protection of Public Law 86-36, 73 Stat. 63 (1959). The in camera affidavit provides the kind of detail approved in Hayden & Fonda v. National Security Agency, 608 F.2d 1381, 1389-91 (D.C. Cir. 1979), cert. denied, 48 U.S.L.W. 3730 (U.S. May 12, 1980). The Court finds that release of this material could seriously jeopardize the work of the agency and the security of the United States. Under the standards set forth in Hayden & Fonda, the claim of Section (b)(3) exemption must be granted in its entirety. No consideration needs to be given the additional claim for protection under Exemption 1. The standards of Public Law 86-36 have been met.

The Court also finds that the affidavits support nondisclosure for the four documents that are not intelligence reports. Defendant has provided plaintiff with much of the contents of these documents and also has provided a description of both the documents and the deletions. The various claims under Exemptions 1, 3, 5 and 6 as to these documents are proper. The withheld portions either are not responsive to plaintiff's request or are properly exempted.

Throughout the Court's review of this material, the Court has been aware of the public interest in the issue of UFOs and the need to balance that interest against the agency's need for secrecy. The in camera affidavit presents factual considerations which aided the Court in determining that the public interest in disclosure is far outweighed by the

sensitive nature of the materials and the obvious effect on national security their release may well entail.

The Court has been mindful of the Court of Appeals' view on in camera review of documents in FOIA cases, see Allen v. CIA, No. 80-1380 (D.C. Cir., filed Nov. 12, 1980), but the Court finds in its discretion that the public and in camera affidavits submitted here are amply sufficient to make such review of the documents unnecessary.

For the foregoing reasons, defendant's motion for summary judgment is granted. The case is dismissed.

SO ORDERED.

(Original signed by)
Gesell, J.

UNITED STATES
DISTRICT JUDGE

November 18, 1980

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1981
United States Court
of Appeals, Civil
Action No. 80-01562,
for the District of
Columbia Circuit,
filed Nov. 3, 1981,
Clerk, George A.
Fisher.

NO. 81-1042

CITIZENS AGAINST UFO SOCIETY,

Appellant,

v.

NATIONAL SECURITY AGENCY.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT and ROBB, Circuit Judges, and JOHNSON*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States

District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

This court agrees with the result reached by the District Court in this case, generally for the reasons stated in its Memorandum and Order filed November 18, 1980.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

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*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a) (1976).

10 JAN 1980

Peter A. Gersten, Esquire
191 E. 161st Street
Bronx, N.Y. 10451

Dear Mr. Gersten:

This is in response to your Freedom of Information Act request of February 16, 1979, on behalf of the Citizens Against UFO Secrecy (CAUS), and subsequent telephone conversations with a member of my staff. In your letter you request all documents which this Agency may have that relate or pertain to Unidentified Flying Objects. You also request any and all documents relating to an NSA "group meeting on Thurs., 5 Feb."

Pursuant to your telephone request, I am enclosing a copy of the testimony of our former General Counsel, Daniel B. Silver, that was delivered before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence on April 5, 1979. However, I am unable to provide you with a copy of the testimony delivered by Central Intelligence Agency (CIA) Deputy Director, Frank G. Carlucci. You should be able to obtain a copy of this testimony by writing to the CIA.

Your request has been processed in accordance with 5 U.S.C. 552, the Freedom of Information Act (FOIA). We have conducted a thorough search and are unable to locate any information relating to an NSA "group meeting on Thurs. 5 Feb." Two documents that are within the scope

of your request are enclosed. These documents were released pursuant to an administrative appeal under the FOIA. The documents were written in 1968 by an NSA/CSS employee with an interest in UFOs. One of the documents was originally classified because portions of it tangentially discussed protected activities pertaining to the NSA/CSS. Most of the remaining portions of the documents reflected open-source information on UFOs. We wish to emphasize that these draft documents were never published, formally issued, acted upon, or responded to by any government official or agency. Moreover, they are not "NSA/CSS reports" per se, and they in no way reflect an official NSA/CSS position concerning UFOs. They are subject to the provisions of the FOIA only because they have been retained by this Agency for historical reference purposes. Deletions have been made to these two documents pursuant to the following provisions of Title 5 U.S.C. 552, the FOIA:

1. Title 5 U.S.C. 552(b)(1), which provides that the FOIA does not apply to matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. The classified information that has been deleted from the enclosed records is currently and properly classified in accordance with the criteria for classification in Section 1-3 of Executive Order 12065, and paragraph 2-202 of Department of Defense (DoD) Regulation 5200.1-R. The information has been reviewed for possible declassification or downgrading according

to the provisions of Sections 3-3, 3-4, and 3-6 of Executive Order 12065 and Chapter III of DoD Regulation 5200.1-R and found to be properly excluded from declassification or downgrading.

2. Title 5 U.S.C. 552(b)(3), which provides that the FOIA does not apply to matters that are specifically exempted from disclosure by statute. The applicable statutes in this case are Title 18 U.S.C. 798, Title 50 U.S.C. 403(d)(3), and Public Law 86-36.

Other records that fall within the scope of your request are being withheld in their entirety. These records are exempt from disclosure pursuant to the following provisions of the FOIA:

1. Title 5 U.S.C. 552(b)(1);

2. Title 5 U.S.C. 552(b)(3), in conjunction with Title 18 U.S.C. 798, Title 50 U.S.C. 403(d)(3), and Public Law 86-36;

3. Title 5 U.S.C. 552(b)(5), which exempts inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with this Agency;

4. Title 5 U.S.C. 552(b)(6), which provides that the FOIA does not apply to personnel and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and

No portion of the information being withheld in its entirety is reasonably segregable.

Certain other information, which originated with other Federal agencies and components, is also being withheld. Department of Defense Directive 5400.7, which implements the FOIA for all DoD agencies, provides that when records requested under the FOIA originate with another agency or component, the request shall be referred to that agency or component for disposition. The agencies to which we have referred records will correspond directly with you concerning those records.

Since your request has been denied in part, you are hereby advised of this Agency's appeal procedures.

Any person denied access to records may, within 30 days after notification of such denial, file an appeal to the NSA/CSS Freedom of Information Act Appeal Authority. Such appeal shall be in writing addressed to the NSA/CSS FOIA Appeal Authority, National Security Agency, Fort George G. Meade, MD 20755. The appeal shall reference the initial denial of access and shall contain, in sufficient detail and particularity, the grounds upon which the requester believes release of the information is required. The NSA/CSS Appeal Authority shall respond to the appeal within 20 working days after receipt.

Sincerely,

(original signed by)
ROY R. BANNER
Chief, Policy Staff

3 Encls:
a/s

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
Fort George G. Meade, Maryland 20755

Serial: N9044
2 March 1979

Peter A. Gersten, Esq.
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Dear Mr. Gersten:

This replies to your letter of 29 January 1979 in which you appeal, under the Freedom of Information Act, the National Security Agency's (NSA) denial of eighteen (18) documents referred to us by the Central Intelligence Agency (CIA). I have reviewed your request to this Agency, dated 22 December 1978, the records the CIA referred to NSA, NSA's letter of denial dated 9 January 1979, and your letter of appeal. In particular, I have reviewed the information for relevance to this Agency's classified operations and activities, and the effect disclosure would have on NSA's mission, and have concluded that the denial is proper.

The reasons set forth in this letter for withholding the records referred by CIA are as responsive as possible without disclosing classified information; the protection required precludes my identifying them further. The U.S. Court of Appeals for the District of Columbia has recognized that information disclosed by an Agency about withheld documents would not have to contain facts that if

made public would compromise the secret nature of the information. Vaughn v. Rosen, 157 U.S. App. D.C. 340, ___, 484 F.2d 820, 826 (1973), cert. Denied, 415 U.S. 977 (1974). Classification of the information in question is required because its disclosure would reveal the intelligence sources and methods by which it was derived, the revelation of which would cause damage to the national security interests of the United States. Revealing some information cannot be accomplished without also revealing the capability of our intelligence system to acquire and assimilate it. Thus, no portion of the information is reasonably segregable, as release of any portion would compromise intelligence sources and methods. We are required by statute and Executive Order to protect such sources and methods; therefore, all portions of the record are properly classified. The Chief, Policy Staff, by citing Public Law 86-36 (50 U.S.C. §402 note), 18 U.S.C. §798, and 50 U.S.C. §403(d)(3) as bases for exempting the information, indicated that it was being withheld for this reason. Any further ..... identification of the record would reveal the classified information protected by Public Law 86-36 and 18 U.S.C. __98 and 50 U.S.C. §403. As of 1 December 1978, Executive Order 12065 replaced Executive Order 11652, and the Department of Defense (DoD) Regulation 5200.1-R was revised to implement the new Executive Order. The information being withheld from you has been reviewed in accordance with these new classification guidelines.

With respect to the classification assigned to the information being withheld, I have concluded that the information meets the criteria for classification

in Section 1-3 of Executive Order 12065 and in paragraph 2-202 of DoD Regulation 5200.1-R and that it is properly classified in its entirety within the categories provided in Section 1-1 of Executive Order 12065 and in Chapter I, Section 5 of DoD Regulation 5200.1-R. The information has been reviewed for possible declassification or downgrading according to the provisions of Sections 3-1 and 3-3 of Executive Order 12065 and of Chapter III of DoD Regulation 5200.1-R and found to be properly classified and therefore excluded from declassification or downgrading. In conducting this review, I have weighed the significant need for openness in government against the likelihood of damage to our national security at this time and have determined that the information should continue to be classified. Thus, I find that the Chief, Policy Staff, properly found the information to be exempt from release pursuant to 5 U.S.C. §552(b)(1), and I affirm his denial of your request for release of the information on these grounds.

The National Security Agency is precluded by 18 U.S.C. §798 from providing information concerning classified commuincations intelligence activities except to those persons authorized to receive such information. 50 U.S.C. §403(d)(3) protects information pertaining to intelligence sources and methods. Section 6 of Public Law 86-36 provides that no law shall be construed to require disclosure of the organization or any function of the National Security Agency or any information with respect to the activities thereof. DoD Directive 5400.7,

Sections III and VI.C.3 (32 C.F.R. §§286.2, 286.4(c)(3)), specifically recognizes this exemption. Thus, I also find that the Chief, Policy Staff properly concluded that this information was exempt from release pursuant to 5U.S.C. §552(b)(3), since each of the statutes and the Directive cited above provides adequate grounds upon which to base such an exemption, and I therefore affirm his denial of your request for release of this information on these grounds.

In summary, I find the matter covered by your request clearly within the statutory protections and exemptions cited above, and proper protection of classified information and intelligence sources and methods requires a denial of your appeal. I have also concluded that no portion of the information is reasonably segregable.

As your appeal is denied in its entirety, you are hereby advised of your rights under 5 U.S.C. §552 to seek judicial review. You may seek an order from a United States District Court in the district in which you reside, in which you have your principal place of business, or in which this Agency's records are situated (U.S. District Court, District of Maryland), or in the District of Columbia, for the production of any Agency records which you consider to have been improperly withheld by this Agency. Section 2 of Public Law 93-502 sets out your rights in this matter with respect to such judicial action. Sincerely [Daniel B. Silver, Freedom of Information Act/Privacy Act Appeals Authority]

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
Fort George G. Meade, Maryland 20755

Serial: N9047A
24 March 1980

Peter A. Gersten, Esq.
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Dear Mr. Gersten:

This replies to your letter of 23 January 1980 in which you appeal the National Security Agency's (NSA) partial denial of your request for records under the Freedom of Information Act. I have read your request to this Agency dated 16 February 1979; the records located by this Agency; NSA's response of 10 January 1980 which forwarded three records and denied others in their entirety; NSA's response to you dated 19 December 1979 concerning a record referred to this Agency from the Central Intelligence Agency (CIS); and your letter of appeal. In addition, I caused another search to be conducted. As the result of this review and search I have concluded that the denial by the Chief, Policy Staff was proper and that no additional records may be released to you.

Of the records denied, only one is not classified. It is being denied in its entirety pursuant to 5 U.S.C. §552(b)(5) and (6) as it is an intra-agency memorandum which would not be available by law to a party other than an Agency in litigation with this Agency, and as its

would constitute a clearly unwarranted invasion of personal privacy. No portion of this record is reasonably segregable. I therefore affirm the Chief, Policy Staff's denial of this record on these grounds.

The reasons for withholding the remainder of the records as set forth in this letter are as responsive as possible without disclosing classified information; the protection required precludes my identifying them further. Classification of the records is required because their disclosure would reveal the intelligence sources and methods by which they were derived, the revelation of which would cause damage to the national security interests of the United States. Revealing some information cannot be accomplished without also revealing the capability of our intelligence system to acquire and assimilate it. Thus, no portion of any of these records is reasonably segregable as release of any portion would compromise intelligence sources and methods. We are required by statute and Executive Order to protect such sources and methods; therefore, all portions of the records are properly classified. The Chief, Policy Staff, by citing Public Law 86-36 (50 U.S.C. §402 note), 18 U.S.C. §798 and 50 U.S.C. §403(d)(3) as bases for exempting the records indicated that they were being withheld for this reason. Any further meaningful identification would reveal information classified under Executive Order 12065 and protected by Public Law 86-36, and 18 U.S.C. §798, as well as 50 U.S.C. §403(d)(3). As of 1 December 1978, Executive Order 12065 replaced Executive Order 11652, and the Department of Defense

(DoD) Regulation 5200.1-R was revised to implement the new Executive Order. The information being withheld from you has been reviewed in accordance with these classification guidelines.

With respect to the classifications assigned to the records being withheld, I have concluded that each record meets the criteria for classification in Section 1-3 of Executive Order 12065 and in paragraph 2-202 of DoD Regulation 5200.1-R and that each is properly classified in its entirety within the categories provided in Section 1-1 of Executive Order 12065 and in Chapter I, Section 5 of DoD Regulation 5200.1-R. The records have been reviewed for possible declassification or downgrading according to the provisions of Sections 3-1 and 3-3 of Executive Order 12065 and of properly Chapter III of DoD Regulation 5200.1-R and found to be properly classified and therefore excluded from declassification or downgrading. In conducting this review, I have weighed the significant need for openness in government against the likelihood of damage to our national security at this time and have determined that the records should continue to be classified. Thus, I find that the Chief, Policy Staff properly found the records to be exempt from release pursuant to 5 U.S.C. §552(b)(1), and I affirm his denial of your request for release of the information on these grounds.

The National Security Agency is precluded by 18 U.S.C. §798 from providing information concerning classified communications intelligence activities except to those persons authorized to receive such

information. 50 U.S.C. §403(d)(3) protects information pertaining to intelligence sources and methods. Section 6 of Public Law 86-36 provides that no law shall be construed to require disclosure of the organization or any function of the National Security Agency or any information with respect to the activities thereof. DoD Directive 5400.7, Sections III and VI.C.3 (32 C.F.R. §286.2, 286.4(c)(3)), specifically recognizes this exemption. Thus, I also find that the Chief, Policy Staff properly concluded that the records were exempt from release pursuant to 5 U.S.C. §552(b)(3), since each of the statutes and the Directive cited above provides adequate grounds upon which to base such an exemption. I therefore affirm his denial of your request for release of the records on these grounds.

In addition to being exempt from disclosure pursuant to 5 U.S.C. §552(b)(1) and (3), one of the records can also be properly exempt from disclosure pursuant to 5 U.S.C. §552(b)(5). Exemption 5 has been explained above.

This Agency previously adjudicated eighteen of the records described above, which had been referred to us by the CIA. See Daniel B. Silver's letter to you dated 2 March 1979 (Serial N9044).

As the result of the new search that was conducted, we located additional records that originated with other federal agencies and components. In accordance with DoD Directive 5400.7, we have referred those records to the originating agencies for their disposition. They will correspond directly to you concerning

their records.

In summary, I find the matter covered by your request clearly within the statutory protections and exemptions cited above, and proper protection of classified information and intelligence sources and methods requires a denial of your appeal.

As your appeal is denied in its entirety, you are hereby advised of your rights under 5 U.S.C. §552 to seek judicial review. You may seek an order from a United States District Court in the district in which you reside, in which you have your principal place of business, or in which this Agency's records are situated (U.S. District Court, District of Maryland), or in the District of Columbia, for the production of any Agency records which you consider to have been improperly withheld by this Agency. 5 U.S.C. §552(a)(4)(B) sets out your rights in this matter with respect to such judicial action.

Sincerely,

DANIEL C. SCHWARTZ
Freedom of
Information Act/
Privacy Act Appeals
Authority

Freedom of Information Act as Amended in 1974 by Public Law 93-502 (Amendments are underscored)

§552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized

by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Directors of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To

the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecesary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and

(2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(3)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for documents search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the district of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the

exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complianant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether

disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority to the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the correction action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in the whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) or subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations by such agency not to comply, with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551 (1) of this title includes any executive department, military department, Government corpoation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

1. Public Law 86-36 Section 6

Nothing in this Act or any law... shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of names, titles, salaries, or number of the persons employed by such agency.

Executive Order 12065
Fed. Reg. 28949(1978)

1-6 Prohibitions

1-602. Basic scientific research information not clearly related to the national security may not be classified.

303. Declassification Policy

3-301. Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity

with the passage of time or on the occurrence of a declassification event.

3-302. When information is reviewed for declassification pursuant to this Order or the Freedom of Information Act, it shall be declassified unless the declassification authority established pursuant to Section 3-1 determines that the information continues to meet the classification requirements prescribed in Section 1-3 despite the passage of time.

3-303. It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest, in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweights the damage to national security that might reasonably be expected from disclosure.

3-305. No agency in possession of a classified document may in response to a request for the document made under the Freedom of Information Act or this

Order's Mandatory Review provision, refuse to confirm the existence or non-existence of the document, unless the fact of its existence or non-existence would itself be classifiable under this Order.

AFFIDAVIT OF EUGENE F. YEATES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS AGAINST UNIDENTIFIED FLYING OBJECTS SECRECY, Plaintiff, v. NATIONAL SECURITY AGENCY, Defendant.	Civil Action No. 80-1562

AFFIDAVIT OF EUGENE F. YEATES

State of Maryland)
) ss.:
County of Anne Arundel)

Eugene F. Yeates, being duly sworn, deposes and says:

1. I am the Chief, Office of Policy, of the National Security Agency (NSA). As Chief, Office of Policy, I am responsible for processing all initial requests made pursuant to the Freedom of Information

Act (FOIA) for NSA records. I have read and am familiar with the allegations contained in the Complaint in this case. The statements herein are based upon my knowledge, upon my personal review of information available to me in my official capacity, and upon conclusions reached in accordance therewith.

2. I submit this affidavit regarding all records that have been located by the NSA pursuant to the plaintiff's FOIA requests, in support of the Agency's Motion for Summary Judgment. To supplement this testimony, I will execute an additional affidavit, classified TOP SECRET, to provide highly classified information which is not available in the public realm and which specifically identifies the NSA records being withheld from the plaintiff for the Court's in camera consideration.

THE RELEVANT DOCUMENTS

3. This Agency received four separate referrals (described below) from the Central Intelligence Agency (CIA) concerning NSA documents located by that Agency when it was engaged in FOIA litigation concerning information pertaining to UFOs. (Ground Saucer Watch v. CIA, D.D.C. #78-859.) The first was on November 9, 1978 when this Agency received copies of fifteen Agency documents located by CIA. The NSA also received two other referrals from CIA on December 4, 1978 which provided three additional NSA documents. Subsequently by letter dated December 14, 1978, attorney for the plaintiff, Peter A. Gersten (who was the attorney of record in the CIA litigation) was informed by CIA of the referral of the documents to this Agency. Mr. Gersten then filed a request with NSA for the eighteen

documents in his own name on December 22, 1978. In a letter dated January 9, 1979, Roy R. Banner, Chief, Policy Staff, advised Mr. Gersten that the NSA records that had been referred to this Agency by CIA were exempt from release under 5 U.S.C. §552(b)(1) because they are classified in their entirety, and exempt from release under 5 U.S.C. §552(b)(3) because they are exempt from release by 18 U.S.C. §798, 50 U.S.C. §403(d)(3) and Section 6 of Public Law 86-36 (50 U.S.C. 402 note). (A copy of this letter is attached to the Complaint as Exhibit C. A true and correct copy is also attached to this affidavit as Exhibit 1.)

4. By letter dated January 29, 1979 Mr. Gersten appealed the denial of the documents referred by the CIA. (A copy of this letter is attached to the Complaint as Exhibit D. A true and correct copy of this letter (less

enclosures) is also attached to this affidavit as Exhibit 2.) On March 2, 1979 the NSA Freedom of Information Act/ Privacy Act Appeals Authority affirmed the denial of the request for release of the information on the same grounds, i.e., that the information is classified in its entirety and therefore exempt from release under 5 U.S.C. §552(b)(1) and that the information is exempt from release under 5 U.S.C. §552(b)(3) for the reason that other statutes prevent its disclosure, to wit: 18 U.S.C. §798, 50 U.S.C. §403(d)(3) and Section 6 of Public Law 86-36. (A copy of this letter is attached to the Complaint as Exhibit E. A true and correct copy is also attached to this affidavit as Exhibit 3.)

5. On February 16, 1979 plaintiff in the instant case, by counsel, filed an FOIA request with NSA for all documents

in possession or under the control of NSA relating to UFOs and the UFO phenomena. (A copy of this letter is attached to the Complaint as Exhibit F. A copy is also attached hereto and marked Exhibit 4.) By letter dated January 10, 1980, Mr. Banner released two documents within the scope of the request; deletions of information exempt under the provisions of 5 U.S.C. §552(b)(1) and (b)(3) were taken prior to that release. Plaintiff was also advised in this letter that other NSA documents existed but were exempt from release under 5 U.S.C. §552 (b)(1) because they are classified in their entirety; exempt from release under 5 U.S.C. §552(b)(3) because disclosure of them was prohibited by 18 U.S.C. §798, 50 U.S.C. §403(d)(3) and Public Law 86-36; exempt from disclosure under 5 U.S.C. §552(b)(5) because they are intra agency memoranda, or letters

which would not be available by law to a party other than an agency in litigation with this Agency; or exempt under 5 U.S.C. §552(b)(6) because they are to personnel or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. (A copy of this letter is attached to the Complaint as Exhibit G. A true and correct copy is also attached to this affidavit as Exhibit 5.) The January 10 letter also advised the plaintiff that certain information, originating with other Federal agencies or components would be referred to the originating agency. A total of seventy-nine documents were referred to various agencies for their direct response to plaintiff.

6. An additional NSA document was referred to the NSA by the CIA on July 27, 1979. (The fourth and final CIA referral.) In a letter dated December 19, 1979, Mr.

Banner responded to the referral by again advising Mr. Gersten that this record is exempt from release under 5 U.S.C. §552 (b)(1) because it was classified in its entirety, and exempt from release under 5 U.S.C. §552(b)(3) because disclosure of it was prohibited by 18 U.S.C. §798, 50 U.S.C. §403(d)(3) and Public Law 86-36. (A true and correct copy of this letter is attached as Exhibit 6.)

7. By letter dated January 23, 1980, plaintiff appealed the denial of the information referred by CIA and the subsequent denial of his general FOIA request of February 16, 1979. By reply letter dated March 24, 1980, the NSA Freedom of Information Act/Privacy Act Appeals Authority affirmed the denial of plaintiff's request for release of information on the same grounds as cited above. (A copy of this letter is attached to the Complaint as Exhibit K.

A true and correct copy is also attached to this affidavit as Exhibit 7.

8. Finally, a portion of a document which is responsive to the plaintiff's request was recently declassified and released to counsel for the plaintiff by letter dated September 15, 1980. (A true and correct copy of this letter less the enclosure is attached as Exhibit 8.)

THE STATUS AND MISSION OF NSA

9. NSA was established by Presidential Directive in October 1952 as a separately organized Agency within the Department of Defense under the direction, authority, and control of the Secretary of Defense, who was designated by the President as Executive Agent of the Government for conducting the communications security activities and signals intelligence activities of the United States. A primary signals intelligence (SIGINT)

mission of NSA is to intercept radio communications sent to or from foreign governments in order to obtain foreign intelligence information necessary to the national defense, national security, or the conduct of foreign affairs. The intelligence information derived from the intercept of foreign communications is called communications intelligence (COMINT). Of the NSA records at issue in this case, only four are not COMINT reports and will be addressed separately. All of the remaining records sought in this civil action are the product of signals intelligence activities.

10. These COMINT activities include the targeting of foreign governments' communications both within their borders and to and from communicants abroad involving the use of their own radio transmitter and receiver facilities not available for public use. Such

communications links are known as "government net" communications. A foreign government may use other means for sending and receiving international radio communications in addition to or instead of its own government facilities. (International radio communications as used here includes communications passed at least in part by wire.) This involves the foreign government's use of the facilities of an international communications common-carrier which is also available for use by the public. Such common-access carriers supply the means by which more than half the encrypted and plain text radio communications of foreign governments, foreign organizations, and their representatives are carried.

11. It is common knowledge that the total volume of radio signals transmitted on a given day is vast. It is also generally known that radio transmissions

can be received by anyone operating the proper receiving equipment in the right place at the right time. Thus, the fact that NSA can intercept radio communications is generally known. So, too, is it known to foreign officials that such interception of radio communications is a primary mission of the NSA. Foreign officials may be expected to know, also, that NSA cannot possibly intercept even a significant percentage of all such communications, especially taking account of the fact that NSA's activities involve worldwide communications, not solely those having a United States terminal. The number is simply too vast to be handled with any reasonable amount of personnel and equipment. Moreover, the cost and effort of such interception would be disproportionate to the intelligence value of the results.

12. Instead--as NSA's foreign intelligence targets presumably know well--NSA must focus its interception activities on those particular communications lines, channels, links or systems which yield the highest proportion of useful foreign intelligence information. What foreign government officials do not know, however, is which of the vast number of radio communications NSA attempts to intercept, which are intercepted, and, of those that are intercepted, which yield to NSA processing methods and techniques. It is the protection of this critical information that is at the heart of the instant case.

13. The continued efficacy of NSA's vital intelligence activities requires that the lines, channels, links and systems actually monitored remain unidentified. If a foreign government obtains sufficient reason to suspect that NSA is able to

intercept and process t[illegible] government's radio communications, t[illegible] government would be expected to take immediate steps to defeat that capability. This can be accomplished in a number of ways. A foreign government might shift to communications links that U.S. cannot intercept. It may also choose to use alternate methods of communications. The foreign governments may possess the technical capability to either upgrade or initiate cryptography to secure its communications. Finally, a communication channel believed to be targeted by NSA can be used by a foreign government to pass misleading information.

14. If a foreign power is successful in defeating an interception operation, all of the intelligence from that source is lost unless and until NSA can establish a new and equivalent intercept. The risk involved is great. The

information produced by NSA includes political, economic, scientific and military data which is of immeasurable value to the President, the Secretary of Defense, the Secretary of State and other policymakers. Obviously, if a COMINT source used by the Agency becomes unavailable, policymakers must operate without the information that source produced. Sometimes it is impossible to establish a new and equivalent intercept and the source is lost permanently. Those losses are not only extremely harmful to the national security but also impose a heavy burden on the limited resources of NSA which must attempt to recover the old source or establish an equivalent source of information.

15. Even after targeting only a small proportion of all available electromagnetic communications for interception, the number of messages intercepted is

extremely large. NSA thus is faced with a considerable task in selecting out those messages that will be reviewed for possible intelligence interest. The manner in which NSA does this selection and the degree of reliability and success its methods enjoy are subjects about which virtually no authoritative information has ever been released to the public. Information about these subjects would enable foreign observers to further assess, and thus take steps to defeat, the capabilities of NSA's intelligence gathering techniques.

RELEASE OF COMINT REPORTS

16. The COMINT reports being withheld from the plaintiff are all based on intercepted foreign communications. The disclosure of these records would identify the communications that had been successfully intercepted and processed for intelligence purposes. No meaningful

portion of any of the records could be segregated and released without identifying the communications underlying the communications intelligence report. Also disclosed would be the communications lines, channels, links, and systems targeted and intercepted and NSA's capabilities to successfully process the underlying communications. These communications targets and the processing techniques are current intelligence sources and methods. Disclosing them would permit foreign intelligence officials to draw inferences and make assessments about this nation's COMINT collection and processing activities that would enable them to take counter-measures, as described above, to defeat the capabilities of NSA's intelligence gathering techniques.

17. The COMINT reports being withheld from the plaintiff are classified in

their entirety to protect intelligence sources and methods. When originated, certain of the records were properly classified Top Secret pursuant to Executive Order 10501, Section 1(a), providing for the application of that classification to information, the unauthorized disclosure of which could result in exceptionally grave damage to the nation, such as the "compromise of ... intelligence operations ... vital to the national defense." Other documents were properly calssified Secret pursuant to Executive Order 10501, Section 1(b), providing for the application of that classification to information, the unauthorized disclosure of which could result serious damage to the nation, such as by "compromising...information revealing important intelligence operations." The rest, which were originated after June 1, 1972, were properly

classified Top Secret pursuant to Executive Order 11652, Section 1(A), providing for the application of that classification to information, the disclosure of which could result in exceptionally grave damage to the national security, such as "the compromise of complex cryptologic and communications intelligence systems," or were properly classified Secret under Executive Order 11652, Section 1(B), providing for the application of that classification to information, the unauthorized disclosure of which could result in serious damage to the national security, such as the revelation of significant intelligence operations. Each COMINT record was appropriately marked when it was originated. Each COMINT record and each portion thereof remains properly so classified. These COMINT records meet the criteria for classification in Section 1-3 of

Executive Order 12065, and they are properly classified within the categories provided in Section 1-1 of the Order. I have reviewed all of the COMINT records being withheld from the plaintiff for possible declassification or downgrading according to the provisions of Sections 3-1 and 3-3 of Executive Order 12065 and I find each portion of each record remains properly classified and therefore excluded from declassification or downgrading. In conducting this review, I weighed the significant need for openness in government against the likelihood of damage to our national security at this time and determined that the records should continue to be classified because of the damage their unauthorized disclosure would reasonably be expected to cause to communications intelligence activities of the United States Government. Because they are properly

classified under Executive Order 12065, the records are exempt from disclosure pursuant to 5 U.S.C. §552(b)(1).

18. Release of the COMINT records being withheld from the plaintiff or any portion of any of them would disclose information about the nature of NSA's activities including its functions and thereby jeopardize the intelligence collection mission of the Agency. (See paragraphs 11 through 15 above.) This mission of the NSA is singular and unique. Public disclosure of specific information about the records in the context of that singular mission would reveal certain functions and activities of the NSA which are protected from disclosure by Section 6 of Public Law 86-36, 50 U.S.C. §402 (note). Moreover, the disclosure of these classified records or of specific information about them would reveal information protected by 18 U.S.C. §798

prohibiting the unauthorized disclosure of classified information concerning the communications intelligence activities of the United States. The disclosure of these records or any portion of them would also compromise classified information pertaining to intelligence sources and methods protected from disclosure by Section 103(d)(3) of the National Security Act of 1947 (50 U.S.C. §403(d)(3)). Accordingly, it was determined that the COMINT records are exempt from release under 5 U.S.C. §552(b)(3) of the Freedom of Information Act because each portion of each record is protected from disclosure by Section 6 of the Public Law 86-36, 18 U.S.C. §798, and by Section 103(d)(3) of the National Security Act of 1947.

19. It should be noted that the classification of these COMINT records and the withholding of them pursuant to

FOIA exemptions (b)(1) and (b)(3) are not based only on the substantive content of the documents but also on the characteristics of the reports that identify the intelligence sources and methods that would be seriously jeopardized by the disclosure plaintiff seeks. That is, all of the COMINT reports at issue here (with one exception) are based on messages which were intercepted from government net communications systems. (See paragraph 10, above.) Moreover, almost all of these messages were enciphered when originally transmitted. Thus, release of any portion of the substantive message would not only risk identifying the ability of NSA to intercept a particular line of communications but would also risk revealing the capability of NSA to read a foreign government's enciphered messages. Similar harm would result from the disclosure of any material that might help to

identify the communications intercepted by NSA, such as information about date, time, origin or manner of transmission or receipt. Also, the revelation of the substantive content of the reports would allow foreign officials to determine which channels or types of communications are being monitored. The public disclosure of either the content of the reports or of any identifying characteristics would have the same adverse consequences on the communications intelligence activities of the United States. All such information relates to classified communications intelligence functions of NSA that have not been publicly disclosed by the Agency in any other context.

RELEASE OR NON-COMINT RECORDS

20. Three of the four non-COMINT records at issue here were released in large part, with certain deletions. One of these records was withheld in its

entirety. These documents are:

a. A document entitled UFO Hypothesis and Survival Questions which was prepared by an Agency employee. The entire report has been released except for the name and organization of the preparer of the document. This is not a COMINT report and contains no reference to SIGINT activities. It is a draft of a monograph that was located in an Agency file where it had been retained for historical reference purposes. The deletion was made pursuant to 5 U.S.C. §552(b)(3) which provides that the FOIA does not apply to matters that are specifically exempted from disclosure by statute. The applicable statute in this instance is Section 6 of Public Law 86-36 which specifically exempts from disclosure the names and titles of NSA employees.

b. The second non-COMINT document is a memorandum which discusses the UFO

phenomena as the author believes they may relate to the intelligence community. This document was released with deletions of the descriptive references to the COMINT operations of the Agency. The deletions contain information which I have determined to be currently and properly classified and, thus, exempt from disclosure under 5 U.S.C. §552(b)(1). Portions of the material deleted also concern information with respect to the organization and operational activities and functions of NSA which are exempt from disclosure pursuant to 5 U.S.C. §552(b)(3) which provides that the FOIA does not apply to matters that are specifically exempted from disclosure by another statute. Section 6 of Public Law 86-36 provides that no law shall be construed to require disclosure of the organization or any function of the NSA or any information with respect to the

activities thereof. Moreover disclosure of this information would reveal information protected by 18 U.S.C. §798 which prohibits the unauthorized disclosure of classified information concerning COMINT activities and by the National Security Act of 1947 (50 U.S.C. §403(d)(3)) which prohibits the disclosure of information pertaining to intelligence sources and methods. A portion of this document was deleted pursuant to 5 U.S.C. §552(b)(5) because it represents this employee's expression of opinion on how the topic relates to the mission of the Agency. This deletion is non-factual and does not represent finalized Agency policy. It includes the kind of analysis, frank comment and recommendations, which an agency must encourage and protect from public disclosure to avoid a chilling effect upon free and candid internal discussions in support of optimum

decision making within the Agency. Finally, a portion of this record in addition to being exempt from disclosure under 5 U.S.C. §552(b)(1) and (b)(3) is being withheld for the reason that it is not within the scope of plaintiff's request.

c. The third non-COMINT document is a memorandum for the record by an NSA assignee that was originally withheld in its entirety pursuant to 5 U.S.C. §552 (b)(5) and (b)(6). In my review today I have ascertained, however, that this memorandum is neither in whole nor in part responsive to the plaintiff's request. It does not deal with UFOs or the UFO phenomena. Rather, it is a document voluntarily prepared by the assignee to report an incident that occurred during his attendance at a UFO symposium. It is the assignee's personal account of his activities and does not

include reference to any UFO sighting or phenomena.

d. The final non-COMINT record is a report which was addressed in paragraph 8, above. The portion of the record responsive to this FOIA request has been released to plaintiff's attorney (see Exhibit 8, attached hereto). The remaining portions of the record contain no reference relating to UFOs or UFO phenomena and are, therefore, not responsive to plaintiff's request.

21. Further information about the records or portions thereof being withheld is contained in the in camera affidavit executed by me.

Eugene F. Yeates
Chief, Office of Policy
NSA

Subscribed and sworn to before me this (30th) day of September 1980.
(NOTARY PUBLIC)
Commission expires on July 1, 1982.